No. 78-66

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROSE ANGELINO, ET AL., PETITIONERS

v.

MABEL DODSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINION BELOW

By order of February 23, 1978 (Pet. App. A-4, pp. 16-18), *sub nom. Dodson* v. *Salvitti*, 571 F. 2d 571 (table), the court of appeals affirmed and adopted the unreported memorandum opinion of the district court. The district court's memorandum opinion is reproduced as Petitioners' Appendix A-3.

JURISDICTION

Judgment of the court of appeals was entered on February 23, 1978 (Pet. App. A-4, pp. 17-18). A timely petition for rehearing was denied by the court of appeals on April 10, 1978 (Pet. App. A-5, p. 19). The petition for writ of certiorari was filed on July 10, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners, residents of an urban renewal area, should have been permitted to intervene as of right under Rule 24(a)(2), Fed. R. Civ. P., in an action which was brought by displaced persons against the United States Department of Housing and Urban Development and the Philadelphia Redevelopment Authority to compel those agencies to provide them with permanent replacement housing.

STATEMENT

Petitioners, current residents of an area of Philadelphia known as "Society Hill," seek to intervene under Rule 24(a)(2), Fed. R. Civ.,[1] in an action brought by former residents of an urban renewal area to compel the United States Department of Housing and Urban Development (HUD) and the Philadelphia Redevelopment Authority (RDA) to provide permanent replacement housing.

Several of those former residents were defendants in an action brought in 1972, *Octavia Hill Association* v. *Charles Miller, et al.*,[2] in which the owner of a block of houses in the Washington Square East Urban Renewal Area (URA) sought to evict tenants in order to rehabilitate housing on the block under a contract with RDA. HUD and RDA were named as additional

[1]Rule 24(a)(2) reads:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: * * * (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[2]Civil Action Nos. 73-1594, 73-1595, 73-1596, 73-1597, 73-1598, 73-1599 (E.D. Pa.).

defendants in the *Octavia Hill* case, but were dismissed as part of a stipulation agreement entered into on October 11, 1973. That agreement provided that the tenant-defendants would be housed temporarily in RDA properties and that RDA would actively support the rehabilitation of property within the URA as a "permanent relocation resource" for the tenants. At that point, after the parties had reached a settlement, petitioners sought to intervene in that action, but were refused permission by the trial judge (Pet. 3). Petitioners' concern then, as now, was with the allegedly detrimental effect which government subsidized housing would have on their neighborhood.[3]

On July 26, 1974, former residents of the Washington Square East Urban Renewal Area filed the present action, alleging that HUD and RDA had violated several housing statutes,[4] certain Civil Rights Acts[5] and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution by failing to provide adequate permanent replacement housing to persons displaced from their homes in the Washington Square East Urban Renewal Area as part of urban renewal activities. The former residents requested that HUD and RDA be ordered to provide permanent replacement housing in accordance with their statutory duty and "in a manner affirmatively to promote racial integration" (Complaint, pp. 10-11). The former residents also requested the court

[3]The Washington Square East Urban Renewal Area has roughly the same boundaries as "Society Hill."

[4]Act of July 15, 1949, 63 Stat. 413, 42 U.S.C. 1441, *et seq.*; Act of August 1, 1968, 82 Stat. 518, 42 U.S.C. 1469, *et seq.*; Act of January 2, 1971, 84 Stat. 1894, 42 U.S.C. 4601, *et seq.*

[5]Act of April 20, 1871, 17 Stat. 13, 42 U.S.C. 1983; Act of July 2, 1964, 78 Stat. 252, 42 U.S.C. 2000d; Act of April 11, 1968, 82 Stat. 81, 42 U.S.C. 3601, *et seq.*

to enjoin the demolition or other disposal of housing or land within the Washington Square East Urban Renewal Area, which was owned by RDA and could be used for permanent replacement housing, until defendants had provided permanent replacement housing for the former residents.

The case did not go to trial; instead, the parties entered into negotiations resulting in a consent decree which was approved by the court on September 16, 1977.[6] On January 13, 1977, before the consent decree was approved and while the parties were negotiating, petitioners moved to intervene in the action under Rule 24(a)(2). The district court, by order filed February 8, 1977, denied this motion. On March 4, 1977, petitioners filed a second motion which they now call a renewed motion to intervene. Petitioners, proposed intervenors, attempted in their second motion to claim an interest relating to the property or transaction which was the subject of the action since the location of government-subsidized housing in their neighborhood would depress property values ([Renewed] Motion to Intervene as Defendants, p. 2). They also claimed they were so situated that the disposition of the action might as a practical matter impair or impede their ability to protect their interest, and that they were not adequately represented by the existing defendants. In their answer to the complaint attached to their motions to intervene, petitioners pleaded no defense not already pleaded by the existing defendants. The proposed intervenors claimed they were concerned that RDA and/or HUD were to willing to compromise with the plaintiffs,

[6]The consent decree provides that HUD and RDA will arrange for the construction of 14 to 18 dwelling units for the plaintiffs in the Washington Square East Urban Renewal Area.

who wished to live in their neighborhood in subsidized housing ([Renewed] Motion to Intervene as Defendant, p. 3).

The district judge denied the second motion to intervene by order of April 19, 1977 (Pet. App. A-2, p. 2). By memorandum opinion filed August 5, 1977 (Pet. App. A-3, pp. 3-15), the court concluded that the proposed intervenors had no interest which related to the property or transaction which was the subject of the action because the former residents' complaint sought only that HUD and RDA comply with federal statutes dealing with relocation of displaced persons, not that they should be provided with permanent housing in the specific area of "Society Hill" (Pet. App. A-3, p. 9). The court alternatively concluded that, even assuming, *arguendo*, that the proposed intervenors met the requirements of Rule 24(a)(2) as to interest, the motion was not timely made as required by the Rule. The district judge stated that the proposed intervenors "knew or should have known" from the time the action began that the ultimate disposition of the case might well affect their interest, yet they remained on the sidelines for about 2½ years after the action was commenced (Pet. App. A-3, p. 12).

The Court of Appeals for the Third Circuit affirmed the district court's denial of intervention, adopting the district judge's opinion (571 F. 2d 571 (table).) The proposed intervenors' Petition for Rehearing was also denied.

ARGUMENT

This case presents no issue warranting review by this Court. The decision does not conflict with the decision of any other court of appeals or of this Court. The court of appeals neither departed from the accepted and usual course of judicial proceedings nor decided an important question of federal law requiring the intervention of this Court. On the contrary, the court of appeals applied

established law to the facts of this case. As to any challenges petitioners make to findings of fact by the district court, this Court has often stated that it is not "a court for correction of errors in fact finding," and "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

The district court must enjoy some discretion in determining whether the requirements for intervention have been met. *Rios* v. *Enterprise Association Steamfitters Local Union No. 638 of U.A.*, 520 F. 2d 352, 355 (C.A. 2). Applying Rule 24(a)(2) to the facts of this case, one cannot say the trial court erred in denying petitioners the right to intervene in this litigation. Petitioners failed (1) to establish the necessary interest relating to this action, (2) to demonstrate that they were so situated that the disposition of the action would as a practical matter impair or impede their ability to protect any interest they might have, (3) to show that they were inadequately represented by the existing parties, and (4) to timely move for intervention.

1. Petitioners claimed no interest "relating to the property or transaction" which was the subject of the former residents' action, within the meaning of Rule 24(a)(2). Simply stated, the former residents demanded in their complaint adequate permanent replacement housing, not housing in the particular neighborhood, "Society Hill." And even if, as a practical matter, housing was demanded in petitioners' neighborhood, petitioners did not have the required "significantly protectable interest" to entitle them to intervene. *Donaldson* v. *United States*, 400 U.S. 517, 531. This interest must be a "direct, substantial, legally protectable interest in the proceedings." *Diaz* v. *Southern Drilling Corp.*, 427 F. 2d

1118, 1124 (C.A. 5), certiorari denied *sub nom. Trefina, A.G.* v. *United States*, 400 U.S. 878. Petitioners' only alleged interest in this litigation was the possibility that several units of government subsidized housing would be placed in their neighborhood and that this might have an adverse effect on property values and the "quality of [petitioners'] lives" (Pet. 39). Such an interest is too contingent and indirect to qualify under the Rule. See *Air Lines Stewards, Etc., Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101, 105 (C.A. 7); *Old Colony Trust Co.* v. *Penrose Industries Corp.*, 387 F. 2d 939 (C.A. 3). Even assuming a decrease in their property values, petitioners would have no cause of action for a "taking" of their property. *Sayre* v. *City of Cleveland*, 493 F. 2d 64, 69 (C.A. 6), certiorari denied, 419 U.S. 837. And allegations as to damage to "quality of life" might well conflict with the policies of the Civil Rights Acts. In the circumstances, the courts below did not err in finding the interest asserted by petitioners insufficient under the Rule. See *United States* v. *Alpine Land and Reservoir Company*, 431 F. 2d 763, 768-769 (C.A. 9), certiorari denied, 401 U.S. 909.[7]

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[7]Petitioners make much of *Joseph Skillken and Co.* v. *City of Toledo*, 528 F. 2d 867 (C.A. 6), vacated and remanded, 429 U.S. 1068, prior decision adhered to *Metropolitan, Etc.* v. *Village of Arlington Heights*, 558 F. 2d 1283 (C.A. 7) (Pet. 20-25), a case superficially similar in some respects to petitioners', but inapposite. *Skillken* involved the right of neighboring landowners to intervene in an action by minority persons and a company constructing low-income housing to require members of the city council to rezone an area where the suit might have resulted in nullification of a zoning ordinance on which property owners relied in purchasing and developing their properties. In the present case, the district judge noted that "[t]he present litigation in no way seeks the construction of any type of housing that does not comply fully with all valid zoning, building, fire and safety codes, rules and regulations" (Pet. App. A-3, pp. 13-14). The plaintiffs here did not bring an action to

2. Petitioners are not "so situated that the disposition of the action may as a practical matter impair or impede" petitioners' ability to protect whatever interest they may have. The consent decree in this case will not have the kind of *stare decisis* effect found sufficient under Rule 24(a)(2) in cases such as *Atlantis Development Corp.* v. *United States*, 379 F. 2d 818 (C.A. 5). Compare *Air Lines Stewards, Etc., Loc. 550* v. *American Airlines, Inc.*, 455 F. 2d 101, 106 (C.A. 7); *United States* v. *Allegheny Ludlum Industries, Inc.*, 517 F. 2d 826, 845-846 (C.A. 5) (consent decrees unlikely to have *stare decisis* effects measurably adverse to proposed intervenors). The "mere inconvenience" of having to litigate separately is not sufficient under the Rule. *Blake* v. *Pallan*, 554 F. 2d 947, 954 (C.A. 9).

That petitioners' ability to protect their interest has not been impaired or impeded as a practical matter by the denial of intervention is clear, as petitioners' counsel has

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rezone any property, and even if the construction of the requested housing involves some minor zoning changes, a fact not established by petitioners, it is doubtful that petitioners could bring an action under Pennsylvania law to challenge these. See *Burne* v. *Kearney*, 424 Pa. 29, 225 A.2d 892, 894; *Hollearn* v. *Silverman*, 338 Pa. 346, 12 A.2d 292, 294. See also *Eastlake* v. *Forest City Enterprises*, 426 U.S. 668, 674 (note 8). Compare relevant Ohio law, discussed in *Skillken, supra*, 528 F. 2d at 874-875. Moreover, in *Skillken*, rezoning of a particular neighborhood was requested, whereas in the present case permanent replacement housing (and any zoning changes this might involve) was demanded in connection with no particular neighborhood. Finally, *Skillken* involved what the court of appeals termed a "broad order" converting the nature of the case to that of an action "to desegregate the residential areas of the entire City of Toledo," with the municipal defendants ordered to submit to the court within 90 days a comprehensive desegregation plan. 528 F. 2d at 880. The present case involves no such issues, which may have influenced the court of appeals' treatment of the proposed intervenors' claim in *Skillken*.

already brought an action against HUD and RDA challenging the consent decree on behalf of other residents of "Society Hill." *Society Hill Civic Association* v. *Harris*, E.D. Pa., Civil Action No. 77-3102. Petitioners are free to intervene in that action, and their timely motion to intervene presumably would be denied only if the district court found that their interests were already adequately represented by the plaintiffs in that action, in which case petitioners would have no cause to complain.

3. It is not clear at all that petitioners' interests were not "adequately represented by existing parties." Rule 24(a)(2).[8] A presumption of adequate representation generally arises when the representative is a governmental body charged by law with representing the interests of the absentee. *Commonwealth of Pennsylvania* v. v. *Rizzo*, 530 F. 2d 501, 505 (C.A. 3), certiorari denied *sub nom. Fire Officers Union* v. *Pennsylvania*, 426 U.S. 921. See also *Sam Fox Pub. Co.* v. *United States, 366 U.S. 683 (dictum)*. The burden of showing inadequate representation under the Rule is on the proposed intervenor. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538. Representation is adequate "if no collusion is shown between the representative and an opposing party, if the representative does not have or represent an interest adverse to the proposed intervenor and if the representative does not fail in the fulfillment of his duty." *United States* v. *Board of School Commissioners, Indianapolis, Ind.*, 466 F. 2d 573, 575 (C.A. 7) (denial of intervention upheld where proposed intervenors claimed that by entering into stipulations and a consent decree the

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[8]The district judge found that there was "no duty on the part of any of the defendants to protect against the alleged effect that a settlement will have on the interests claimed" by petitioners (Pet. App. A-3, p. 13).

board had failed to assert their interests as vigorously and effectively as proposed intervenors could have). "[A]ny case, even the most vigorously defended, may culminate in a consent decree." *Commonwealth of Pennsylvania* v. *Rizzo, supra,* 530 F. 2d at 505. "That [petitioners] would have been less prone to agree to the facts and would have taken a different view of the applicable law" does not mean that the defendants in the present case failed to represent their interests in this litigation. *United States* v. *Board of School Commissioners, Indianapolis, Ind.*, supra, 466 F. 2d at 575. Petitioners have not shown collusion on the part of HUD and RDA with the plaintiffs (Pet. 33-36). Nor is it clear that defendants' interest in providing housing and promoting the redevelopment of Philadelphia is necessarily adverse to petitioners. The defendants raised essentially the same defenses against the plaintiffs as proposed intervenors raised in their own answer. *Commonwealth of Virginia* v. *Westinghouse Electric Corp.*, 542 F. 2d 214, 216 (C.A. 4).

4. Petitioners' motions to intervene were not timely, as required by Rule 24(a)(2). Timeliness under the Rule is to be determined from all the circumstances, and a court's ruling on timeliness will be disturbed only for abuse of discretion. *National Association for the Advancement of Colored people, et al.* v. *New York,* 413 U.S. 345, 366.

The most important factor in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay. *McDonald* v. *E.J. Lavino Co.*, 430 F. 2d 1065, 1073 (C.A. 5). In this case, petitioners sought to intervene in an action in which they claimed to have an interest approximately 2½ years after it was brought, at a time when the parties were negotiating a settlement.[9] To

[9]Petitioners likewise sought to intervenue in the earlier *Octavia Hill* litigation after the parties and reached an agreement (Pet. 11).

permit petitioners to raise their objections at that late hour would obviously have prejudiced the existing parties who sought to end years of litigation through settlement. The district judge found that petitioners "knew *or should have known*" from the time this litigation began that the ultimate disposition of the case might affect their asserted interests (emphasis added) (Pet. App. A-3, p. 12). Considering the alleged importance of this proceeding to petitioners, the publicity surrounding the litigation, and petitioners' attempted intervention in the earlier *Octavia Hill* action, it is plain that this finding did not constitute an abuse of discretion. *National Association for the advancement of Colored People, et al.* v. *New York, supra*, 413 U.S. at 366-367.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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